In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-69.

ALAN MACKEY,
REGISTRAR OF MOTOR VEHICLES OF THE
COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
DONALD E. MONTRYM ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEE

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STATUTES INVOLVED

The Registrar has set forth Massachusetts General Laws (G.L.) Ch. 90 §24(1)(f) under this section

in his brief. However, a proper understanding of the questions presented by this appeal cannot be obtained without a close examination of this section's counterpart, namely, §24(1)(g) which reads:

> Any person whose license, permit or right to operate has been suspended under paragraph (f) shall be entitled to a hearing before the registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have a right of access as invitees or licensees, (2) was such person placed under arrest, and (3) did such person refuse to submit to such test

> or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate.

QUESTIONS PRESENTED

A more accurate statement of the "Questions Presented" by this appeal is as follows:

1. Whether the one-sided "form affidavit" procedure under §24(1)(f) is sufficiently reliable to justify Massachusetts' suspending a motorist's license without affording him a prior opportunity to respond on the issues set forth in §24(1)(g)?

2. Whether the Registrar's post-termination procedures are a constitutionally permissible substitute to affording the motorist a pretermination opportunity to respond to the issues set forth under §24(1)(g)?

STATEMENT OF THE FACTS[1]

Montrym maintains that the Registrar's STATEMENT OF THE FACTS is inaccurate and deficient on several important points.

POINT 1: At p. 8 in his brief, the Registrar correctly states that the Report of Refusal to Submit to a Chemical Test (hereinafter "Report of Refusal") required by §24(1)(f) must be sworn to under the pains and penalties of perjury by the police officer receiving the refusal of a motorist to take the breathalyzer test, and "endorsed" by a witness to the refusal, and further "endorsed" by the appropriate police chief. However, further at p. 8, the Registrar states that both the

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1 Montrym concurs with the Registrar's STATEMENT OF THE PRIOR PROCEEDINGS. However, it should be observed that the Registrar, and understandably so, did not include the contempt proceeding brought against him for failure to comply with the district court's judgment (A.59-60).

officer receiving the subject refusal and the witnessing officer must sign the Report of Refusal under the pains and penalties of perjury "as required by the challenged statute". From this point on, and notwithstanding the plain language of the statute, and the district court's findings,[2] the Registrar continues to state that both the receiving and witnessing police officers sign the Report of Refusal under the pains and penalties of perjury.[3]

POINT 2: The Registrar's description of the state court criminal proceedings against Montrym omits the important fact that the state court made specific findings of fact and entered these upon the face of the state court record. In particular, the state court found: "BREATHALYZER REFUSED WHEN REQUESTED WITHIN 1/2 HOUR OF BEING AT [THE POLICE] STATION. SEE ATTACHED AFFIDAVIT AND MEMORANDUM" (A.33). In

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2 See Montrym v. Panora, Registrar of Motor Vehicles, 429 F. Supp. 393, 398 (D. Mass. 1977).

3 See e.g., the Registrar's brief, at p. 26.

the affidavit (A.36-39) referred to, Montrym set forth under oath that he and his attorney, Richard B. Harris, Esq., had requested the police to administer the breathalyzer test and that the police had refused to do so. Montrym also set forth that the breathalyzer would have confirmed that he was not under the influence of intoxicating liquor.

POINT 3: The Registrar's version of events subsequent to May 25, 1976 is critically deficient, to say the least. An accurate statement is set forth as follows:

On May 25, 1976, the Registrar received the Report of Refusal from the Acton Police Department with respect to Mr. Montrym (A.29). On June 2, 1976, Montrym's attorney, Richard B. Harris, Esq., wrote the Registrar and informed him that the state court had dismissed the criminal charge of driving under the influence against Montrym (A.29, 42). Photocopies of Montrym's motion to suppress and accompanying affidavit (A.36, 39) were attached to this letter. Montrym's attorney also requested that any action relating to Montrym's license be stayed (A.42).

This letter was received by the Registrar on June 3, 1976 (A.29). On June 7, 1976, the Registrar suspended Montrym's license on the basis of the Report of Refusal and pursuant to §24(1)(f), (A.29). The suspension notice (A.44-45) set forth in part the following:

MONTRYM, DONALD E.

> You are hereby notified that in accordance with statutory authority I have this day SUSPENDED YOUR LICENSE TO OPERATE MOTOR VEHICLES.
>
> . . . .
>
> This action is effective as of the hour it was issued and you must comply with it immediately. You are subject to arrest if you fail to do so.
>
> . . . .
>
> When your LICENSE to operate motor vehicles has been suspended or revoked you must CEASE OPERATING and DELIVER

> TO ME AT ONCE said license and/or permit. You must not again operate a motor vehicle until your license has been reinstated.
>
> Robert A. Panora
> Registrar of Motor Vehicles

Montrym surrendered his license to the Registrar on June 8, 1976 (A.29). On June 11, 1976, the Registrar replied to Mr. Montrym's attorney as follows (A.48):

Dear Sir:

In reference to your letter of June 2, 1976 concerning the above-named, this is to advise you that his license has already been suspended and said license must be returned to this office immediately.

Very truly yours,

Robert A. Panora
Registrar

On June 28, 1976, Mr. Montrym, by the undersigned attorney, made a further demand (A.50, 51) for the return of his license, a portion of which reads as follows:

Dear Sir:

. . . .

Please be advised that Mr. Montrym did not refuse to submit to a breathalyzer test on May 15, 1976 and that he was acquitted of driving under the influence of intoxicating liquors, G.L. Ch. 90 §24(1)(a), on June 2, 1976, complaint no. 4703 in the District Court of Central Middlesex. In addition, the district court made a specific finding on the face of complaint that the police refused to give Mr. Montrym a breathalyzer test after he requested one. This finding is binding upon you. See Ashe v. Swenson, 397 U.S. 436 (1970).

Mr. Montrym depends on his driver's license for

his livelihood. Notwithstanding G.L. Ch. 90 §24(1)(g), your action in suspending his license without affording him a prior hearing is a patent deprivation of his liberty and property without due process and is in contravention of the Fourteenth Amendment of the United States Constitution. See Cicchetti v. Lucey, 377 F. Supp. 215 (1974); and Pollard v. Panora, ___ Supp. ___ (D. Mass. 1976).

Demand is hereby made upon you to immediately reinstate Mr. Montrym's driver's license.

. . . .

Very truly yours,

Robert W. Hagopian

Contemporaneous with these events, Montrym attempted to pursue his appeal

remedies[4] from the Registrar's action in suspending his license on June 7, 1976. More specifically, on this day, Montrym's attorney wrote the Board of Appeal on Motor Vehicle Liability Policies & Bonds for a hearing on the Registrar's action in suspending Montrym's license and denying Montrym's request for a stay as set forth in his attorney's letter of June 2, 1976 to the Registrar (A.29, 46). On June 8, the Board of Appeal mailed a set of forms back to Montrym's attorney (A.29, 47) who received them on June 10, 1976. Montrym's attorney mailed them back

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4 G.L. Ch. 90 §28 provides that "[a]ny person aggrieved by a ruling ... of the Registrar may, within ten days thereafter appeal from such ruling ... to the board of appeal on motor vehicle liability policies and bonds ... which board may, after a hearing, order such ruling ... to be affirmed, modified, or annulled; but no such appeal shall operate to stay any ruling ... of the registrar". The full text of this statute is set forth at p.10 n.6 in the Registrar's brief.

completed on the same day, and the Board of Appeal received them on June 11, 1976 (A.29). On June 24, 1976, the Board of Appeal notified Montrym that it would conduct a hearing on July 6, 1976 (A.49). Montrym did not pursue this hearing as he commenced the instant case on July 2, 1976 in the federal district court. A single judge of the district court issued a restraining order on July 9, 1976 enjoining the Registrar's action (A.23). On July 15, 1976, seven days later, the Registrar complied with the district court order and returned Montrym's driver's license (A.30).

POINT 4: Throughout his brief, the Registrar refers to a "same day" hearing that a motorist may receive pursuant to §24(1)(g). For purposes of clarification, Montrym calls to this Court's attention that when a motorist's license is suspended pursuant to §24(1)(f), he must cease operating his motor vehicle immediately, and surrender his license. He can get a hearing at any time thereafter on any day by walking into a Registry office and requesting one. If his license has been previously surrendered, he will be granted a hearing on the "same day" that he requests one. He cannot, however, continue to drive up to the point in time that he surrenders his license, surrender his license, and then demand a hearing.

SUMMARY OF ARGUMENT

The predicate for driver's license revocation under the subject Massachusetts procedure rests on three factors. First, there must be probable cause that the motorist was driving under the influence of intoxicating liquor. Second, a valid arrest must take place, and third, the motorist must have refused to take the breathalyzer test after being advised by the police that refusal would result in suspension of his license for ninety days.

Under the procedure, the police officer before whom a motorist allegedly refuses to take the test prepares a "form affidavit" to verify the existence of the three factors. The form affidavit is "endorsed" by a witness to the alleged refusal, and further "endorsed" by an appropriate police chief. Upon receipt of the affidavit, the Registrar sends the motorist a suspension notice advising him that his license was suspended as of the hour of its issuance, and that the motorist must surrender his license immediately. Although the suspension notice does not inform a motorist that he may obtain an "immediate" hearing on the underlying three factors, he can obtain such a hearing by walking into any Registry office and requesting one.

The question presented by this appeal is whether the Registrar's summary suspension procedure comports with the dictates of due process. Montrym argues that it does not. More specifically, he maintains that the Registrar's suspension notice is constitutionally deficient in that it does not advise the recipient of the availability of an "immediate" hearing. Far more important, however, is the intervening loss of one's license between the issuance date of the Registrar's revocation notice and the resolution of the "immediate" hearing proceeding, a seven day affair at a minimum. Such a deprivation is substantial and unconstitutional since the motorist is given no opportunity to respond prior to the taking.

While there are exceptions to the "root requirement" of a prior hearing, there are no countervailing governmental interests in the instant circumstances to warrant Massachusetts' doing away with all prior process. That removing drunk drivers from the road is a legitimate state concern is beyond doubt. However, this interest is irrelevant to the present issue since Massachusetts affords the driver who flunks the breathalyzer test a full judicial hearing prior to revoking his driver's license. Further, since the passage of Ch. 505 of the Acts of 1975, ninety

percent of all drunk drivers charged with driving under the influence of intoxicating liquor, including "the most menacing violator in the country, the repeat drunk driver", enter a Driver Education Alcohol Program and thereby avoid license revocation.

Leaving this aside, the risk of mistaken deprivation is significant. The determination of the three essential factors to license revocation necessarily involves a multitude of factual and legal issues, and not just one "simple objectively-ascertainable event" - whether a licensee refused to take the test or not. When such determinations are made on the basis of one-sided procedures, albeit by "form affidavits" of governmental officials, the risk of erroneous action is far from being constitutionally insubstantial.

That there are alternative and available Registry procedures which would afford a licensee prior process is beyond question since the Registrar is employing these in thousands of cases. In particular, and pursuant to G.L. Ch. 90 §22(b), the Registrar may, after due hearing, suspend a motorist's license if he believes he is an incompetent person to operate a motor vehicle. At least fourteen days prior to the hearing, the Registrar gives written notice to the licensee of his intention to suspend

his license as of a specified date. The notice specifies the reasons, and informs the licensee of his right to a hearing within fourteen days on the question of whether there is a just cause for such suspension. Why the Registrar could not adopt this procedure or, alternatively, give a motorist some prior opportunity to tell his side of the story, is not answered, and perhaps understandably so. One thing is certain, however, and that is if Montrym had been given this opportunity, an innocent man would not have suffered a serious deprivation.

Bottom line, Massachusetts' interest in the breathalyzer test is in obtaining evidence necessary to insure the successful operation of its rehabilatative program. This interest can be accomplished "just as well by observing some measure of due process as by not observing it". Accordingly, the judgment of the district court should be AFFIRMED.

ARGUMENT

Introduction

Montrym concurs with the Registrar in that the specific dictates of due process relating to a state's termina-

ting a motorist's driver's license are governed by the criteria set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

However, Montrym traverses the Registrar's application of these criteria to the case at hand for the reasons set forth following.

I - An Individual's Interest In His Driver's License Is So Substantial As To Invoke The Full Breadth Of The Due Process Clause.

The loss of one's driver's license may deprive a licensee of his liberty, livelihood, and pursuit of happiness, Wall v. King, Registrar of Motor Vehicles, 206 F. 2d 878, 882 (1st Cir. 1953)[5]; Allgeyer v. State of Louisiana, 165 U.S. 578, 589 (1897). It is "more serious for some individuals than a brief stay in jail", Argersinger v. Hamlim, 407 U.S. 25, (1972) Powell, J., concurring at p. 48. Such a deprivation is irreparable, irreversible, and is one

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5 "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a liberty which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process," Wall v. King, supra, 882.

for which there is no adequate remedy at law. As such, this Court held in Bell v. Burson, 402 U.S. 535, 539 (1971) that motor vehicle licenses were state-created interests which were protected by the due process clause:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that due process required by the Fourteenth Amendment. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated

> a "right" or a "privilege".[6]

In the instant case, sub. nom. Montrym v. Panora, Registrar of Motor Vehicles (hereinafter "Montrym I"), 429 F. Supp. 393 (three judge court, D. Mass. 1977), the district court held at p. 398 with respect to Montrym's interest in his driver's license:

> In the present action the plaintiff's interest is in possessing a valid driver's license and the attendant right to operate a motor vehicle on a public way in Massachusetts. Little

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6 Clearly, the loss of one's license for ten days is equally as substantial as the temporary loss of one's household furnishings, Fuentes v. Shevin, 407 U.S. 67 (1972), or a ten-day suspension from school, Goss v. Lopez, 419 U.S. 565 (1975); or the temporary loss of electricity in Memphis Light, Gas & Water Div. v. Craft, ___ U.S. ___ (May 1, 1978).

discussion is necessary to establish the importance of mobility in our society. According to the uncontroverted affidavit of the plaintiff, possession of a driver's license is essential to his livelihood. Moreover, an individual who has been erroneously deprived of his license can not be fully compensated for its loss by subsequent corrective administrative action. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970).[7]

Because of the important interest inherent in driver's licenses, this Court held in Bell v. Burson, supra, 542, that a state must afford a motorist "some kind of hearing" as a predicate to license revocation:

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7 To the same effect, see Judge Campbell's dissent in Montrym I, at 402: "There is, they say, no way to make someone whole for mistaken deprivation of a license. I suppose the latter has to be conceded."

> [W]e reject Georgia's argument that if it must afford the licensee an inquiry into the question of liability that determination ... need not be made prior to suspension of the licenses. While "many controversies have raged about ... The Due Process Clause," ibid., it is fundamental that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" before termination becomes effective. (original emphasis)

Similarly, every lower federal court that has considered the driver's license interest with respect to the issue raised in this case, has held it of such importance as to require "some kind of hearing" prior to state termination. See Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974), aff'd on other grounds, 513 F. 2d 1189 (6th Cir. 1975); Chavez v.

Campbell, 397 F. Supp. 1285 (three judge court, D. Ariz. 1973); and Holland v. Parker, 354 F. Supp. 196 (three judge court, D.S.D., C.D. 1973). See also Cicchetti v. Lucey, Registrar of Motor Vehicles, 377 F. Supp. 215 (D. Mass. 1974), rev'd on grounds of mootness, 514 F. 2d 362 (1st Cir. 1975); Pollard v. Panora, Registrar of Motor Vehicles, 411 F. Supp. 580 (three judge court, D. Mass. 1976), striking down a parallel procedure as unconstitutional; and Raper v. Lucey, Registrar of Motor Vehicles, 488 F. 2d 748 (1st Cir. 1973), making the due process clause applicable to motor vehicle license application procedures.

Notwithstanding the weight of authority set forth above, the Registrar maintains that an individual's private interest in his driver's license is not so substantial as to require an evidentiary hearing prior to suspension. In support of his position, the Registrar relies exclusively upon one sentence in Dixon v. Love, 431 U.S 105, 113 (1977): "We therefore conclude that the nature of the private interest here is not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.' Mathews v.

Eldridge, 424 U.S. 319, 343". Montrym submits that the Registrar has taken this sentence out of context, and, as such, his reliance thereon is misplaced.

More particularly, the "private interest" in Dixon is not the complete loss of one's driver's license as the subject "Illinois statute include[d] special provisions for hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges", Dixon, supra, 113. The Illinois statute requires that a motorist whose license has been suspended or revoked file an affidavit setting forth facts to establish his eligibility for "relief and that the driver must return his license to the secretary and in its place is issued" a hardship permit, Dixon, supra, n. 7. Although it is not clear from this Court's opinion in Dixon as to whether applications for hardship permits may be considered before the post-evidentiary hearing under Ill. Ann. Stat. Ch. 951/2 §2-118, this counsel has been advised by the Technical Services Division of the Illinois Secretary of State that suspension notices issued pursuant to §6-206(a)(3) are not made effective until thirty days from the

date of their issuance,[8] and a licensee may immediately apply for a hardship permit.[9] In any event, it was because Illinois provided these hardship provisions, that this Court "conclude[d]" as it did in Dixon with respect to the nature of the "private interest". On the other hand, Massachusetts does not have any comparable provisions, and, as such, the district court concluded that "the potential for irreparable

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8 This time period would permit an aggrieved licensee to present "written objection ... to the Secretary's attention" in the case of "a clerical error", or, alternatively, time for the licensee to seek judicial injunctive relief, Memphis Light, Gas & Water Div. v. Craft, supra, .

9 As such, Montrym traverses the unsupported allegation on the part of the Registrar at p. 23 of his brief that hardship relief under the Illinois procedure is only available after suspension. Cf. Montrym v. Panora, Registrar of Motor Vehicles, 438 F. Supp. 1157, 1159 n. 1 (D. Mass. 1977).

personal and economic hardship [was] greater in Massachusetts than in Illinois", Montrym v. Panora, Registrar of Motor Vehicles (hereinafter "Montrym II"), 438 F. Supp. 1157, 1160 (three judge court, D. Mass. 1977).

Apart from these considerations, and as noted by this Court in Memphis Light, Gas & Water Div. v. Craft, U.S. ___, n. 24 (May 1, 1978), Dixon did not turn on the first factor of the Mathews test, but rather, it rested upon the second and third factors. As such, we turn to a consideration of these factors.

II - The Risk Of Erroneous License Deprivation Under The Massachusetts Procedure Is So Substantial That The Fourteenth Amendment Requires Some Opportunity To Respond Be Afforded A Licensee Prior To Suspension.

A. The "Temporary" Suspension Between Registry Action Under §24(1)(f) And Resolution Of The "Immediate" Hearing Under §24(1)(g) Is Clearly Subject To The Due Process Clause.

There can be no doubt that Massachusetts must afford a hearing at some time before it permanently deprives[10] a citizen of a liberty or property interest, Dent v. West Virginia, 129 U.S. 114 (1889). It is also equally

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10 "Deprivation" of a state-created interest also includes a state's refusal to grant the interest. Cf. Raper v. Lucey, Registrar of Motor Vehicles, 488 F. 2d 748, 752 (1st Cir. 1973).

clear that the right to notice, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950), and "opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394 (1914), "be granted at a meaningful time and in a meaningful manner", Armstrong v. Manzo, 380 U.S. 545, 552 (1965). However, the question presented by this appeal is whether due process requires that Massachusetts afford a citizen "some sort" of notice and "some sort" of opportunity to respond "before any 'taking'", Arnett v. Kentucky, 416 U.S. 134 (1974)(White, J., concurring and dissenting at p. 186.)

In addressing this issue, initially, it should be observed, as noted above, that in Bell v. Burson, supra, 542, this Court held that "except in emergency situations" a state must afford a motorist "'notice and opportunity for hearing appropriate to the nature of the case' before" terminating his driver's license. The importance of the hearing being given prior to termination is fundamental to due process:

> That the hearing required by the due process is subject to waiver, and is not fixed in form, does not affect its root requirement that an individual be given an opportunity for a hearing

> before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971). (original emphasis)

This principle has been applied with equal vigor to other governmental entitlements, and state-created property and liberty interests. See Memphis Light, Gas & Water Div. v. Craft, supra, striking down a "state" procedure failing "to provide notice reasonably calculated to apprise [consumers] of an administrative procedure to consider ... erroneous [electric] billings, and the failure to afford them an opportunity to present their complaints" before termination; Mathews v. Eldridge, 424 U.S. 319 (1976), sustaining the termination of disability payments under the Social Security Act where the state gave a recipient full access of all the information it was relying upon, a statement of reasons, a summary of the evidence it obtained by independent investigation, and an opportunity to respond by submitting his own

evidence and arguments "to challenge directly the accuracy ... and correctness of the agency's tentative conclusion", all prior to termination; Goss v. Lopez, 419 U.S. 565, 581-584 (1975), requiring school officials to provide opportunity for a student "to tell his side of the story" before imposing a short, ten day, school suspension; Arnett v. Kennedy, 416 U.S. 134 (1974), sustaining the removal of a civil service employee procedure under the Lloyd-LaFollette Act wherein the employing agency gave 30 days' advance written notice to an employee prior to removal, made available to him the material upon which the notice was predicated, provided the employee with an opportunity to appear before the governmental official making the removal decision to answer the charges against him, and rendering a decision, all prior to the effective date of removal; Morrissey v. Brewer, 408 U.S. 471, 485-487, (1972), requiring a preliminary evidentiary hearing before probation revocation; Fuentes v. Shevin, 407 U.S. 67, 96, (1972), striking down ex parte issuance of writs of replevin and imposing a prior hearing requirement; and Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969), striking down ex parte garnishment proceedings requiring prior notice and hearing before seizure. See also Goldberg v. Kelly, 397 U.S. 254 (1970).

Notwithstanding this plethora of authority, the Registrar argues that his "immediate" hearing procedure is constitutionally equivalent to the "root requirement" of a prior hearing. In particular, he argues that a licensee may "surrender his license" to the Registrar, and obtain an "immediate" hearing. Such an argument, however, ignores reality, let alone principles of due process. First, if a licensee receives a notice from the Registrar on a Friday or Saturday, chances are the earliest he could physically get to a Registry office would be Monday morning. He must cease operating his motor vehicle immediately (A.16). If he does not live in a large metropolitan area, more than likely, he will not be able to obtain public transportation.[11] Secondly, the notice (A.16) from the Registrar does not advise a licensee of the availability of obtaining an immediate hearing, a decisive factor in this Court's decision of Memphis Light, Gas & Water Div. v. Craft, supra: "Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure ... petitioners

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11 Cf. Raper v. Lucey, Registrar of Motor Vehicles, supra, 754.

deprived respondents of an interest in property without due process of law."[12] Third, assuming that a licensee could realistically arrange to get to a Registry office within a day or two after notice of suspension, and perhaps arrange to have his attorney there also, the chances are that the matter would not be resolved at the "same day" hearing. This is so because if the licensee raises factual issues, the hearing officer will suspend the hearing so that he will have an opportunity to bring the police officers in, or make a field investigation, or obtain counter affidavits (A.30). When viewed in toto, the procedure is roughly a seven to ten day affair.

A ten day "temporary" suspension is "nonetheless a 'deprivation' in terms of the Fourteenth Amendment". Fuentes v.

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12 The suspension notice does advise a motorist of his right of appeal from any decision or ruling pursuant to G.L. Ch. 90 §28. However, as Montrym's efforts bear witness, the minimum time for obtaining a hearing under this procedure would be about 30 days. By this time, one-third of the ninety day suspension would have expired.

Shevin, supra, 85. More specifically, the Fuentes Court held at p. 86:

> The Fourteenth Amendment draws no bright lines around the three-day, 10-day, or 50-day deprivation of property. Any significant taking of property is within the purview of the Due Process Clause. While the length and consequent severity may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a hearing of some kind.[13]

As such, any "temporary" suspension between the date of the Registrar's notice (A.16) and the resolution of the "immediate" hearing under §24(1)(g) is subject to the "root requirement" of prior process:

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13 See also Sniadach v. Family Finance Corp., supra, 342 (Harlan, J., concurring).

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. ... But no later hearing ... can undo the fact that the arbitrary taking that was subject to procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone," Stanley v. Illinois, 405 U.S. 645, 647. Fuentes v. Shevin, supra, 81-82.

There are, of course, exceptions to the "root requirement" of prior notice and opportunity before termination. Collectively, these exceptions are based on "extraordinary situations" calling for prompt government action or unusual "countervailing interests on the part of government" or in the case of private parties, a situation where the interest of one "party might be defeated outright",

Arnett v. Kennedy, supra, 188, (White, J., concurring and dissenting). Examples of such exceptions are found in Ewing v. Mytinger Casselberry, Inc., 339 U.S. 594 (1950), seizure of misbranded drugs; Fahey v. Mallonee, 332 U.S. 245 (1947), bank failure; Phillips v. Commissioner, 283 U.S. 589 (1931), governmental taxing power; Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928), emergency attachment of assets; Central Trust Co. v. Garvan, 254 U.S. 554 (1921), seizure under Trading with The Enemy Act; and North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). See also Fuentes v. Shevin, supra, 90-92, and Arnett v. Kennedy, supra, 186-190, (White, J., concurring and dissenting). In all these cases, this Court has not required a hearing before the initial "taking", Arnett, supra, 186. However, in each of the cases, a hearing was provided before the taking was finalized.

That there is no "situation" in the instant case[14] that would bring §24(1)(f) under the protection of the exception umbrella of the due process clause is made clear by the opinion of every federal judge that has passed on the

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14 The Registrar has emergency powers under G.L. Ch. 90 §22(a) and §29.

issue heretofore. More specifically, in Holland v. Parker, 354 F. Supp. 196, 202 (D.S.D., 1973), a three judge court held:

> The application of Bell v. Burson, supra, to the facts of the present case results in the conclusion that South Dakota's implied consent statute could survive constitutional challenge only if it met the requirements of an "emergency situation", justifying summary revocation of an operator's license upon refusal to submit to the blood test. At first glance it would appear that the South Dakota statute meets those emergency requirements as enunciated in Fuentes v. Shevin, supra. There is an important governmental and general public interest in keeping the drunk driver off the road, and therefore, if one can assume that a party who refuses the blood test is drunk and that the individual who is caught drunk once will likely be a repeater, there is certainly a legitimate interest in keeping that person from

future use of the highway. Secondly, it could be argued that there is a special need for "very prompt action"; and finally the person initiating the seizure is a "government official" (a law enforcement officer).

The fault in this argument lies in the fact that the state initiates its summary action not to remove the potentially drunk driver from the highways but only if the suspect refuses to submit to the test, which is in itself an irrelevant question. Thus under South Dakota law, if a suspect takes the test and is found to be presumptively under the influence of alcohol, ... his license is not summarily, automatically revoked and will not be revoked until he is convicted of the driving-while-intoxicated charge. ... South Dakota cannot argue that there is a need for summary action to remove the recalcitrant, potentially drunk driver since the basis for revocation without a prior hearing is not intoxication, but refusal to take the test. If there is time to permit prerevocation adjudication for the driver

found presumptively under the influence of alcohol, then there is no reason why the same opportunity should not be afforded the driver who refuses the test.

. . . . .

Thus, even under the emergency doctrine, South Dakota has failed to justify revocation without a hearing for a suspected driver who has refused the test when, if that same driver took the test, he would be permitted to retain his license and be provided a forum for his defense.

Likewise, in Chavez v. Campbell, 397 F. Supp. 1285, 1288 (1973), a unanimous three judge court held:

It cannot be denied that there is a compelling State interest to protect the public from drunk drivers. However, the effect of the implied consent law is not to remove drunks from the road, but rather to remove only those who have refused to submit to the test. Thus, a drunk who takes the breath test

continues to drive and keeps his license, while the driver who may be completely sober, and who refuses to take the test finds himself excluded from the highways.

Accord Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974), aff'd on other grounds, 513 F. 2d 1189 (6th Cir. 1975).

B. The Risk Of Erroneous Deprivation Under The Massachusetts Procedure Is Substantial.

Leaving aside the absence of any countervailing interest on Massachusetts' part to justify its summary suspension procedures under §24(1)(f), we consider next the procedure, and then the risk of erroneous deprivation under the procedure. The basis for license suspension under §24(1)(f) is set forth under §24(1)(g) and is as follows:

1. There must have been probable cause for a licensee's arrest.

2. There must have been a valid arrest.[15]

3. The licensee must have refused to take the breathalyzer test after having been informed by the police that his license would be suspended for a period of ninety days for refusing

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15 Although the term "arrest" in §24(1)(g) has never been construed by Massachusetts case law, we think it manifestly obvious that this term means valid arrest under applicable state and federal law. Indeed, a unanimous three judge federal district court held that the Fourteenth Amendment mandated this construction, Holland v. Parker, supra, 198-200.

to take the test.[16]

All three elements must be proved to justify suspension under §24(1)(f).[17]

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16 Although §24(1)(g) deals literally with whether or not such person refused to submit to such test, we think this provision must be read together with §24(1)(f), and as such, be construed to mean refusal after being advised that failure to take the test will result in license revocation for ninety days. The Registrar's Report of Refusal form (Appendix A) supports this construction. In any event, Bell v. Burson, supra, dictates such a result.

17 Notwithstanding the obvious, the Registrar in his brief at p. 27 maintains that the subject "statute makes simply the informed refusal of the test the ground for suspension". In support of this, he quotes two sentences from §24(1)(f). How the Registrar does away with §24(1)(g), and Bell v. Burson, supra, is something beyond legal imagination.

Under the procedure, the police officer who receives the alleged refusal to take the breathalyzer test prepares a Report of Refusal form prescribed by the Registrar. A copy of this "form" is set forth in Appendix A to this brief. The police officer must assert:

> 1. The grounds for the officer's belief that the licensee arrested had been driving a motor vehicle while under the influence of intoxicating liquors;
>
> 2. That the licensee was in fact arrested for driving under the influence of intoxicating liquors; and;
>
> 3. That the licensee refused to take the breathalyzer test "after having been informed that his license to operate would be suspended for a period

of ninety days for said refusal".[18]

Pursuant to §24(1)(f), the Report of Refusal must be signed under the pains and penalties of perjury by the officer witnessing the refusal,[19] and endorsed

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18 In the Report of Refusal form at A.40-41, the printed form is shown in standard type and the blanks filled in by the police officer are supposed to be in italics. Through an error in the preparation of the record appendix, the quoted language is shown in italics. A blank Report of Refusal form is set forth in Appendix A to this brief which shows the quoted language as part of the "form affidavit".

19 There is nothing in the statute which requires the officer receiving the refusal to be the arresting officer although this was true in Montrym's case.

by a third person witnessing the refusal, and further endorsed by an appropriate police chief.[20]

Viewing this procedure, Montrym asserts that the determination of whether probable cause exists to establish the commission of the criminal offense of driving under the influence of intoxicating liquors[21] cannot be made

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20 As noted above under "POINT 1" of the Statement of the Facts, the Registrar insists in his brief that both the receiving and witnessing police officers sign the Report of Refusal under the penalties of perjury. Not only is this contrary to the statute and the Report of Refusal form prescribed by the Registrar (Appendix A to this brief), but it is also contrary to the district court's finding in Montrym I, supra, at p. 398, that the Report must be "sworn to under the penalties of perjury by the officer to whom the refusal was made, endorsed by a third person who witnessed the refusal, and also endorsed by the police chief".

21 G.L. Ch. 90 §24(1)(a).

with substantial accuracy when based solely on the form affidavit prescribed by the Registrar.[22] By comparison, under Massachusetts procedure, probable cause determinations relating to criminal offenses are made for the most part by judicial inquiry at full adversary hearings in its first-tier courts.[23] Indeed, even in applications

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22 This is particularly true in driving under the influence cases, as usually the police arrive at the scene of an accident and have not made any observations of the conduct of the subject licensee's automobile. Also, in considering the probability of error being committed, it should be observed that the Registrar and his delegates are not attorneys or trained judicial officers, Cf. North v. Russell, 427 U.S. 328 (1975).

23 Under Ch. 478 of the Acts of 1978, effective January 1, 1979, a criminal complaint cannot be issued unless there is an arrest or extentuating circumstances without affording an accused some form of a prior hearing.

for search warrants, probable cause must be determined by inquiry before a neutral magistrate, Coolidge v. New Hampshire, 403 U.S. 443 (1971). Cf. Fuentes v. Shevin, supra, n. 30. Similarly, Montrym maintains that determinations of the validity of a police arrest,[24] or whether the police properly gave a licensee his rights under §24(1)(f), often involve varying factual patterns which cannot be resolved with any appropriate degree of accuracy on the sole basis of one-sided form affidavits. Manifestly, such form affidavits give rise to the "specter of questionable credibility and veracity", Richardson v. Perales, 402 U.S. 389, 407 (1971). As such, they are in pari delicto with the one-sided affidavits struck down in Fuentes v. Shevin, supra.

The case at hand illustrates the difficulties in determining the three issues under §24(1)(g). Initially it should be observed that the Report of Refusal form submitted to the Registrar (A.40, 41) sets forth no facts concerning Montrym's "driving behavior". Indeed, the sole factual basis to support a probable cause determination

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24 G.L. Ch. 90 §21 sets forth the law of arrest with respect to motor vehicle violations. See also G.L. Ch. 90 §29.

that Montrym had committed the criminal offense of driving under the influence of intoxicating liquor was a one sentence description of the "symptoms of intoxication":

> A strong odor of an alcoholic beverage emitted from his person, he was glassy-eyed and unsteady on his feet and he had to hold onto the st. marker to maintain his balance, also spoke in a slurred fashion.

Montrym submits that this language is nothing more than police boilerplate and totally inadequate to establish in itself probable cause that he had been driving under the influence of intoxicating liquor.

More specifically, the Report of Refusal does not set forth any facts to establish operation other than the police officer's filling in Montrym's name in an appropriate blank. Operation is an essential element, and one of the major defenses to the offense. See generally Defense of Druken Driving Cases, Erwin, (Mathew Bender) 3rd ed. Secondly, the Report of Refusal does not set forth one fact relating to Montrym's "driving behavior". Indeed,

it does not even set forth that Montrym was involved in an accident, or if there was one, how it came about. It contains no statements from Montrym, the operator of the other vehicle, or any witness to the accident. Further, the Report of Refusal does not set forth any specific facts to substantiate Montrym's alleged refusal to take the breathalyzer test. It merely sets forth the prearranged printed script:[25]

> The said operator was offered a chemical test or analysis of his breath, but that said operator refused to submit to said test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the Commonwealth would be suspended for a period of ninety days for said refusal, in the presence of the undersigned and a third person witnessing such refusal.

As such, the Report of Refusal is nothing more than meaningless police litany.

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25 See Appendix A to this brief and n.18 supra.

In the state court criminal proceedings, Montrym filed a motion to suppress (A.36, 37) in which he asserted that there was no probable cause to justify his arrest,[26] or probable cause to establish that he was driving under the influence. Further, Montrym alleged that he was denied "the opportunity to exculpate himself by means of the breathalyzer test" (A.37). In support of his motion, Montrym filed an accompanying affidavit (A.38, 39) under the pains and penalties of perjury, setting forth the events that took place on the evening in question. More specifically, Montrym related that the automobile in which he was traveling was hit behind the right rear wheel by a motorcycle. The police arrived and arrested him.[27] At the police station, he was asked whether he wanted "to submit to a breathalyzer test and refused, not knowing that refusal would cost him his license". Twenty minutes after this refusal, by coincidence, Montrym's attorney, Richard Bates Harris, Esq., arrived at the police station. Thereupon, both Montrym and his attorney

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26 See n.24, supra.

27 This is the first time in his life Montrym had "ever been arrested, searched or apprehended by any police" (A.38)

requested the police to administer the breathalyzer test. The police refused. Further, Montrym sets forth his belief that the breathalyzer test would have confirmed that he was not intoxicated or under the influence of intoxicating liquor that evening (A.38-39).

After a hearing before the District Court of Central Middlesex, the complaint charging Montrym with driving under the influence of intoxicating liquor was dismissed. Additionally, the Court entered its specific findings of fact upon the face of the record (A.33):

> 5-28-76 Motion to Suppress & Affidavit filed.
>
> Dismissed. Breathalyzer refused when requested within 1/2 hr. of arrest at station. See affidavit & memorandum.

Leaving his case aside, Montrym maintains that the probability of error is substantial since the Registrar's action is based solely on a "form affidavit", which is inadequate, per se, to establish the three factors under §24(1)(g) necessary to justify suspension under §24(1)(f). Additionally, the risk of error derives from the one-sided procedure. As Justice Frankfurter so eloquently expressed in his concurring

opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-171 (1951), "fairness can rarely be obtained by ... one-sided determination of facts decisive of rights. ... and self-righteousness gives too slender an assurance of rightness". Although the risk in the unilateral procedure is reduced by the affidavit and perhaps the police chief's endorsement, it still remains a one-sided procedure and as such, is not an adequate substitute to having a motorist "present his side of the story," Goss v. Lopez, 419 U.S. 565, 581 (1975).

The Registrar, however, argues that the risk of erroneous action is "trivial" and constitutionally insubstantial. In support of his position, the Registrar argues, first, that the refusal to take the breathalyzer is a "simple objectively-ascertainable event",[28] quoting from Montrym II at 1161. Similarly, Judge Campbell in his dissent in Montrym II at 1163 set forth the same: "The only question is the existence or non-existence of a readily observable fact." The short answer to this argument is that suspension under §24(1)(f) is not predicated solely upon refusal or non-refusal to take the breathalyzer, but on all three factors set forth in §24(1)(g). As noted above, the determination of these three factors involve

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28 Appellee's Brief at p. 26.

many facts, most of which are subjective in nature. Clearly, such a determination involves more than whether a "buyer-debtor has either defaulted or he has not", a determination which this Court has held involves a substantial risk of error when based on one-sided procedures, Fuentes v. Shevin, supra, 83, 93. See also Pollard v. Panora, Registrar of Motor Vehicles, 411 F. Supp. 580 (three judge court, D. Mass. 1976), where the determination was whether a motorist either defaulted or did not default a court summons.

Secondly, the Registrar maintains that the risk is minimal since the affidavit is executed by a governmental official. In particular, the Registrar adopts the reasoning of Judge Campbell's dissent in Montrym II at 401:

> These facts must be reported by the officer in whose presence the test was refused, under penalties of perjury, with an endorsement by a third party who witnessed the refusal as well as by the Chief of Police. That such a report will be reliable in the vast majority of cases seems to me to be a reasonable assumption. The officer assumes personal responsibility for the report; he can be held personally

liable, and may be in trouble with his Chief, for any wilful misrepresentation.

With due deference to the learned judge, Montrym submits that the possibility of error does not turn on probability of police perjury, but rather it derives from the one-sideness of the procedure. Although the affidavit is furnished by a governmental official instead of a private party, Cf. Fuentes v. Shevin, supra, 91, the fact remains that the police officer has an interest in the outcome of the controversy.[29] His version of the facts is tailored to serve his interests and is predicated on his view. As such, the risk of error is clearly not insubstantial.

Montrym's case illustrates only too well the problem in relying upon affidavits of government officials. The police officer signed the affidavit under the pains and penalties of perjury that Montrym refused to take the breathalyzer. This, of course, was true as this fact is confirmed by Montrym in the criminal proceedings (A.39). On the other hand, the police officer failed to advise the Registrar of the critical fact that Montrym requested the breathalyzer twenty minutes later, and that he

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29 Indeed, the police officer is in a sense a litigant in the companion criminal proceedings.

refused to give the breathalyzer to Montrym. It well may be that the police officer's failure was based on his good faith view of the law that Montrym's subsequent change of mind did not erase his initial refusal. As it turned out, however, the police officer's view was in error.[30]

Lastly, the Registrar maintains that Montrym's case was an unusual one and that this Court should not make it the basis for invalidating §24(1)(f). Montrym maintains that the circumstances relating to his refusal are not unusual. First, there can be no doubt of the emotional upset he underwent on the evening in question. This was the first time he had ever been arrested, searched, or apprehended by any police (A.38). He was also "frisked and manacled with hands behind his back", (A.38). Due to the arrest, Montrym became separated

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30 Some states have obviated this problem by defining the time in which the test must be given. See e.g., N.C.G.L. Ch. 20 §20-16.2(1)(4) which sets forth that a motorist has "a right to call an attorney and select a witness...; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights".

from his son of whom he was a sole surviving parent (A.39). He alleges that the police never advised him of the consequences of his refusal to take the breathalyzer as they were required to under §24(1)(f). Further, Montrym was unable to reach an attorney by telephone (A.39). Montrym submits that it is not unusual for a citizen to refuse to take a police-administered test when he does not know the consequences of his refusal and where he has not been able to consult with an attorney concerning the consequences. The fact that Montrym changed his mind upon consulting with an attorney within twenty minutes (A.39) is supportive of his position. In any event, the number of times the police fail to give an arrestee his rights is not anymore unusual than the number of times the computer slips up, a possibility this Court held as not being "insubstantial" in Memphis Light, Gas & Water Div. v. Craft, supra.[31]

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31 Montrym also alleged that the police had no probable cause to arrest him. The fact that he was found not guilty on the driving to endanger charge supports his position.

C. The Registrar Has Alternative Procedures Open To Him Which Would Provide A "Meaningful Hedge Against Erroneous Action".

Montrym condedes that the Fourteenth Amendment does not guarantee him a full evidentiary hearing with an unconditional right of cross examination prior to license termination pursuant to §24(1)(f). His position is that he should have a minimum opportunity to respond, or "to tell his side of the story" prior to any action being taken by the Registrar. Montrym further argues that such opportunity must be given at a meaningful time.

To be sure, an aggrieved licensee can file a written objection[32] prior to the Registrar's action. That such a procedure would be nothing more than an exercise in futility is evidenced by the Registrar's response to Montrym's attorney's efforts. It is submitted that the Registrar's response (A.48) to Montrym's attorney's "written objection" (A.42) is a paradigm of Registry bureaucracy. The Constitution must hold state

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32 Cf. Dixon v. Love, supra, 113; "Of course there is the possibility of clerical error, but written objection will bring a matter of that kind to the Secretary's attention".

officials to a higher level than that of zombies. Cf. Wood v. Strickland, 420 U.S. 308, 322 (1975).[33]

Alternative Registry procedures were suggested by a unamimous three judge court in Pollard v. Panora, Registrar of Motor Vehicles, supra, at 588. Montrym submits that these procedures are appropriate to the circumstances of this case:

> [T]he present notice of suspension [A.16] might be amended to provide notification of a time and place where the [licensee] will have an opportunity to show cause as to why his license should not be suspended on a given date for his failure to have appeared at a prior hearing. This would not even require an increase in postage. Of course, it is not the responsibility of this court to suggest any one of among several methods by

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33 See also the "written objections" in Pollard v. Panora, Registrar of Motor Vehicles, supra, 582-583. Cf. Raper v. Lucey, Registrar of Motor Vehicles, supra.

> which the state may satisfy due process. As the Court of Appeals has said however, ... 'if the state can accomplish its purpose just as well by observing some measure of due process as by not observing it, it should tread the former path.' Palmigiano v. Baxter, 487 F. 2d 1280, 1287 (1st Cir. 1973)... .

See also the majority's approach below in Montrym I at 398-399, and Montrym II at 1160: "The opportunity need not be a formal hearing, but must at a minimum give the licensee a chance to alert the Registrar to the possibility that suspension is unwarranted and would be unjust." This approach is substantially the same suggested by this Court in Goss v. Lopez, supra, 583-584;

> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then

determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses.

In oral argument below, Judge Campbell suggested essentially the same procedure. See Montrym II, 1159-1160, at n. 2. Further, Judge Campbell asked the Registrar why he could not adopt such a procedure. The Registrar did not answer the question then, nor has he answered it in his brief. The reason he does not answer is simple - he is embarrassed to advise this Court that he is currently using this procedure in thousands of other cases pursuant to Ch. 90 §22(b) which provides that:

1. The Registrar, after due hearing, may revoke the license of any person who he believes is an incompetent person to operate a motor vehicle.

2. At least fourteen days prior to such hearing, the Registrar must give a written notice to the licensee of his intention to suspend his license as of a specified date.

3. The notice must specify the reasons for the intended suspension and inform the licensee of his right to a hearing within fourteen days on the question of whether there is just cause for such suspension.

D. The Registrar's Reliance On Dixon V. Love, 431 U.S. 105 (1977) Is Misplaced.

Lastly, on this branch of the argument, Montrym traverses the Registrar's reliance upon Dixon v. Love, 431 U.S. 105 (1977) as supporting his position that the summary procedure under §24(1)(f) is constitutionally valid. In Dixon, this Court held that a pre-termination hearing was not required before Illinois could revoke a motorist's driver's license. More particularly, under the Illinois procedure, the Secretary of State was required to revoke a motorists' license if it "had been suspended three times in 10 years". Love's license had already been suspended twice and a third suspension was "required under a different rule because [he] had three convictions in one year". All three suspensions were based upon traffic convictions, the validity of which Love did not contest. As such,

this Court concluded that "an evidentary hearing need not precede revocation of a driver's license ... for [Love] 'had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the ... decision was based'", Memphis Light, Gas & Water Div. v. Craft, supra, n. 24, quoting from Dixon, and holding that Dixon was an "exception to the requirement of some prior process".[34]

The factors in the present case are not even remotely similar to those in Dixon. Montrym's revocation was not based on any adverse judicial or administrative findings, and neither was he given any opportunity to respond or to tell his side of the story prior to

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34 See also Almeida v. Lucey, Registrar of Motor Vehicles, 372 F. Supp. 109 (three judge court D. Mass.), aff'd, 419 U.S. 806 (1974); Scott v. Hill, 407 F. Supp. 301, 304 (E.D. Va. 1976); Nusberger v. Wisconsin Division of Motor Vehicles, 352 F. Supp. 515 (W.D. Wisc. 1973); and Wright v. Malloy, 373 F. Supp. 1011, 1018-1019 (three judge court D. Vt.), aff'd 419 U.S. 987 (1974).

the Registrar's action in suspending this license. As such, the risk of error between the Illinois and Massachusetts procedure is not comparable. Accordingly, Montrym maintains that Dixon is inapposite to the issues at hand.

III - There Is No Governmental Interest At Hand To Justify Massachusetts' Denying A Motorist His Fundamental Right To A Meaningful Opportunity To Respond Before It Seizes His Property.

With reference to the third branch of the Mathews test, the Registrar calls to our attention Massachusetts' interest in removing drunks from the highway. In particular, the Registrar quotes from Dixon, supra, the need "to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the safety of others". Further, the Registrar sets forth the statistics on fatal injuries and the percentage of alcohol-related fatal accidents. These show that alcohol is involved in approximately one-third of all the fatal accidents (A.31, 70-74). As such, the Registrar maintains that the Massachusetts has a compelling interest in lessening the carnage on its highway

which in turn justifies its summary suspension procedures under §24(1)(f).

This argument on the part of the Registrar is specious, to say the least. More specifically, the Massachusetts legislature has provided, pursuant to §24D, that any driver who is charged or convicted with driving under the influence of intoxicating liquor can be assigned, if he consents, to the Driver Educational Alcohol Program (hereinafter, "THE PROGRAM"). Further, §24E provides that if such person has the criminal complaint "continued without a finding", then, upon compliance in THE PROGRAM, the driving under the influence charge is dismissed. When a case is "continued without a finding", no conviction appears upon the face of the record, and, as such, the Registrar does not revoke the person's license pursuant to §24(1)(b).[35]

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35 Cf. Costarelli v. Massachusetts, 421 U.S. 193 (1975); Costarelli v. Panora, Registrar of Motor Vehicles, 423 F. Supp. 1309, aff'd 431 U.S. 934 (1977); and Costarelli v. The Commonwealth, 734 Mass. Adv. Sheets [1978].

In 1976, the first year THE PROGRAM was in effect, 85%[36] of all drunk drivers charged with driving under the influence of intoxicating liquor received a "continued without a finding" disposition and, as such, continued to operate their motor vehicles of the highways of Massachusetts and the rest of the nation. Although the statistics have not been published for 1977, they indicate the percentage to be approximately 90%. Since Massachusetts has permitted almost all of its drunks to

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36 The number of persons receiving a "continuance without a finding" disposition for 1976 was 14,986, according to the 1976 Annual Report of the Office of the Commissioner of Probation on THE PROGRAM. The statistics for the number of driving under the influence cases are published by fiscal years ending June 30, and in fiscal year ending June 30, 1976, there were 17,735 cases. See n.41 to appellant's brief. Of the 17,735 defendants charged, some, obviously, were found not guilty. Of these, some were truly innocent and as such, should have been excluded from the percentage calculation.

remain on the road, the question arises as to what compelling state interest exists to justify Massachusetts summary procedure under §24(1)(f). The short answer is there is none.

Besides neglecting to inform this Court of the crucial statistics set forth above, the Registrar has further misled this Court by maintaining that THE PROGRAM is only available to "first-time" and "new offender[s]". See the Registrar's brief at pp. 12 & 32. His position is correct with reference to THE PROGRAM when it commenced on July 1, 1975 pursuant to Ch. 647 of the Acts of 1974 (§24D). However, on July 15, 1975, the Governor signed Ch. 505 of the Acts of 1975 (§§24D & 24E) with an emergency rider making it effective immediately.[37] The effect of Ch. 505 was to open the floodgates to repeat offenders by allowing them to enter (and reenter) THE PROGRAM and eliminate their licenses from being revoked.

An examination of the legislative history of Ch. 505 shows that the Registrar "strongly" opposed the bill. Indeed, the Registrar wrote the governor of July 11, 1975 urging him not to sign the bill. He also set forth his reasons

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37 Sections 24D and 24E are set out at pp. 42 and 47 of appellant's brief, respectively.

in a memorandum which, to put it mildly, flies in the face of his present position that the Massachusetts' rehabilitative provisions are only applicable to "first-time offenders":

> ... Chapter 647 proved to be a severe departure from the basic liquor law as expressed under Chapter 90, Section 24 [(1)(a)], but it was never given a chance to be implemented.
>
> On the heels of the effective date of Chapter 647, H.6412 appears and effectively blows 647 to pieces, for within its message the most menacing violator in the country, the repeat drunk driver, is treated as if a first offender.
>
> Fifteen members of the Chapter 130 Commission took all facets of the drunk driver situation into consideration and unanimously concluded that a repeat offender should <u>not be given consideration</u>!!! Yet H.6412 ignores this and chooses to treat him as if he never were convicted previously.

Chapter 647 gave the courts an alternative procedure in handling convicted drivers provided they had not been previously convicted within a six year period, and those of us who worked with this statute were looking forward to implementing the July 1, 1975 statute, because we believe seriously that the first offender did indeed deserve the consideration being given him. However this new bill (H.6412) waters down the intent of the Committee and the proponents of the legislation to the point that we are now simply shuffling papers. (emphasis added)[38]

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38 Statistics bear out the Registrar's fears concerning "the most menacing violator in the country, the repeat drunk driver". The 1976 Annual Report of the Office of the Commissioner of Probation on THE PROGRAM shows that 5-10% of all its "graduates" were back in THE PROGRAM while all the time they remained on the road.

Bottom line, the Massachusetts legislature has made a policy determination that drunk drivers, including "the most menacing driver in the country", should be rehabilitated in THE PROGRAM rather than penalized by license revocation. Since there is a rational basis[39] for such a determination, and since it was made through

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39 See House Bill 6163 which includes The Report of the Special Commission Relative to the Penalty for Driving under the Influence of Intoxicating Liquor at p. 6: "The current mandatory one year revocation period has proven less than totally effective in controlling drunk driving in Massachusetts. In the face of such an inflexible sanction, and given a sensitivity to the economic hardship which results from the loss of the driving privilege, police officers appear reluctant to arrest drunk drivers. Judges similarly appear reluctant to enter convictions in drunk driving cases. And, on appeal, juries appear reluctant to sustain convictions".

the "majoritarian political process", it is entitled to the highest degree of deference by this Court. Cf. Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

Montrym submits that Massachusetts' sole interest in the breathalyzer test is in obtaining evidence necessary to insure the successful operation of its rehabilitation program. That this interest can be accomplished without the threat of instant punishment and "just as well by observing some measure of due process as by not observing it", Palmigiano v. Baxter, supra, 1287, is obvious. As such, there is no justification on Massachusetts' part to warrant its summary procedures.

Lastly, the Registrar asks this Court to consider the administrative burden that would result if this Court were to impose a prior hearing requirement to revocation under §24(1)(f). In support thereof, the Registrar cites the fact that the Massachusetts courts processed 17,735 driving under cases in fiscal year ending June 30, 1976, and maintains that additional Registry hearing officers will be required to conduct the hearings.

Montrym traverses this argument. First, he submits that administrative efficiency, per se, should not be a

consideration in resolving whether due process requires an opportunity to respond, but should be considered only with reference to what type of opportunity to respond the State must afford a licensee. In the instant case, Massachusetts provides no opportunity to respond, and to this extent, administrative efficiency is not an issue.

Secondly, Montrym maintains that the administrative burden required of a state to meet the minimum dictates of due process cannot serve as a basis for its denying a citizen his constitutional rights:

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. ... Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interest of the person whose possessions are about to be taken. Fuentes v. Shevin, supra, at n. 22.

Apart from these considerations, there is no valid reason why the Registrar cannot conduct his entire ten-day "immediate" hearing procedure, which he is presently using, prior to revocation under §24(1)(f) instead of after revocation. As such, he would not even bear "an increase in postage", Pollard v. Panora, Registrar of Motor Vehicles, supra, 588. The Registrar, however, argues that if a prior opportunity to respond is afforded a licensee, the number of hearings will be greater and this in turn will cause an increased administrative burden.

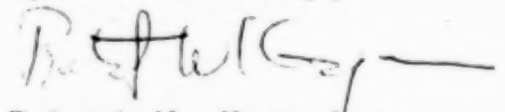
The Registrar does not set forth any specifics with respect to any potential increase in the number of contested cases, or any attendant incremental costs. Rather, he has chosen to muddy the waters by citing the annual number of driving under the influence cases in Massachusetts' first-tier courts. What this number has to do with the issue at hand is a legal mystery. In terms of present reality, the number of licensees refusing the breathalyzer test has been steadily declining since the threat of license revocation resulting from the criminal charge of driving under the influence has almost vanished in light of the passage of Ch. 505 of the Acts of 1975. In short, any increased administrative cost that might flow from this Court's imposing a prior opportunity to respond requirement would be

constitutionally insignificant when weighed against a licensee's claim of innocence.

CONCLUSION

For the reasons set forth above, Montrym respectfully prays this Court to AFFIRM the judgment below.

By his attorney,



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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
REPORT OF REFUSAL TO SUBMIT TO CHEMICAL TEST

TO: The Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

FROM: _____
(Name of Police Unit)
_____
(Address)

RE: _____
(Operator's Name)
_____
(Address)
_____
(City) (State)
_____
(Date of Birth) (Exp.Date of Lic.)
_____
(License Number-Indicate Issuing State)

_____
(Vehicle Owner)
_____
(Address)
_____
(City) (State)
_____
(Reg. No.) (State)
_____
(Exp. Date of Registration)

Was the operator arrested on a charge of operating a motor vehicle while under the influence of intoxicating liquor upon a way or in a place to which the public has a right of access as invitees or licensees in violation of Section 24 of Chapter 90 of the General Laws?

YES _____ NO _____

Date of Arrest _____ Location _____

Name of Arresting Police Officer _____

State reasonable grounds as follows to believe that the said operator committed said violation:

(1) State operator's driving behavior and details of pursuit (if any) and apprehension:

_____
_____
_____

(2) State symptons of intoxication: _____
_____
_____
_____

The said operator was offered a chemical test or analysis of his breath, but that said operator refused to submit to said test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the Commonwealth would be suspended for a period of ninety days for said refusal, in the presence of the undersigned and a third person witnessing such refusal.

_____
At (Place, Date and Time of Refusal)

Commonwealth of Massachusetts

_____, ss.
(County)

Signed under the penalties of perjury this _____

day of _____, 19_____.

_____
Signature and title of police officer
(before whom such refusal was made)

_____
Police Chief or authorized person

_____
Signature of third person witnessing refusal

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